

No. 11996

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United States  
Circuit Court of Appeals  
for the Ninth Circuit

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THE FIRST NATIONAL BANK OF PORTLAND, as Executor of the Estate of JOHN B. ELIE, Deceased, for and on behalf of the surviving widow, MATILDA C. ELIE, and the surviving daughter, JACQUELINE ELIE,  
Appellant,

vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY; JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Southern District of California,  
Northern Division

AUG 20 1948

FILED



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vs.

JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, doing business under the assumed name and style of RANKIN AERONAUTICAL ACADEMY; JOHN GILBERT RANKIN and R. S. NORSWING, co-partners, d.b.a. RANKIN AVIATION INDUSTRY; R. S. NORSWING, individually, and SHIRLEY LORRAINE RANKIN, as Executrix of the Estate of JOHN GILBERT RANKIN, Deceased,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

GERALD BRIDGES,  
215 West Sixth St.,  
Los Angeles 14, Calif.

McCARTHY, DICKSON & SWINDELLS,  
700 Yeon Bldg.,  
Portland 4, Oregon.

JOHN B. EBINGER,  
U. S. National Bank Bldg.,  
Klamath Falls, Oregon.

For Appellees:

O'CONNOR & O'CONNOR,  
530 West Sixth St.,  
Los Angeles 14, Calif. [1\*]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the  
Southern District of California,  
Northern Division

No. 707-N.D.

THE FIRST NATIONAL BANK OF PORT-  
LAND as executor of the estate of JOHN B.  
ELIE, deceased, for and on behalf of the surviv-  
ing widow, MATILDA C. ELIE, and the sur-  
viving daughter, JACQUELINE ELIE,  
Plaintiffs,

vs.

JOHN GILBERT RANKIN and R. S. NOR-  
SWING, co-partners, doing business under the  
assumed name and style of RANKIN AERO-  
NAUTICAL ACADEMY, and JOHN GIL-  
BERT RANKIN and R. S. NORSWING, co-  
partners, doing business under the assumed  
name and style of RANKIN AVIATION IN-  
DUSTRY; R. S. NORSWING, individually,  
and SHIRLEY LORRAINE RANKIN as Ex-  
ecutrix of the estate of JOHN GILBERT  
RANKIN, deceased,

Defendants.

### CIVIL COMPLAINT

Plaintiff for cause of action against the defend-  
ants and each of them, alleges:

#### I.

That at all times and dates herein mentioned the  
The First National Bank of Portland was and is  
now a national banking association, organized and



existing by virtue of the laws of the United States of America, conducting a general banking and other business within the State of Oregon, and authorized to act as executor of Estates within the State of Oregon.

## II.

That the The First National Bank of Portland, the plaintiff herein, is the duly appointed, qualified and acting executor of the estate of John B. Elie, deceased, by virtue of an appointment duly made by the Circuit Court of the State of Oregon for Klamath County, [2] and that such executor and the widow and the dependent daughter of plaintiff's decedent, at all times herein mentioned, were and are now bona fide residents, inhabitants and citizens of the State of Oregon and non-citizens of the State of California; that Shirley Lorraine Rankin is the duly appointed, qualified and acting executrix of the estate of John Gilbert Rankin, deceased, by virtue of an appointment duly made by the Superior Court of the State of California for Tulare County, and that said John Gilbert Rankin, at the time of the accident herein complained of, and each and every one of the defendants above named, were then, and at all times herein mentioned, and now are residents, inhabitants and citizens of the State of California, and that there is a diversity of citizenship existing between the plaintiffs and defendants herein.

## III.

That more than the sum of Three Thousand

(\$3,000.00) Dollars, exclusive of interest and costs, is involved in this action.

#### IV.

That at all times herein mentioned, the defendants, Rankin and Norswing, co-partners, doing business as RANKIN AVIATION INDUSTRY and/or RANKIN AERONAUTICAL ACADEMY, were the owners and operators of a certain Republic Amphibian Seabee Aircraft, Department of Commerce No. NC 6096K, and that the partner John Gilbert Rankin, in furtherance of the activities of said partnership, was the pilot thereof.

#### V.

That on or about the 23rd day of February, 1947, at about the hour of 2:50 o'clock in the afternoon of said day, said John Gilbert Rankin, operating said Seabee Airplane, took off from the Klamath Falls Airport at Klamath Falls, Klamath County, Oregon, with the plaintiff's decedent, John B. Elie as one of the passengers in said airplane; that said take-off executed by the said Rankin, as Pilot, and the subsequent flight was done in a careless, negligent and reckless manner, in that, at the time and place of said take-off and flight and under the conditions of the altitude [3] of the airport, the temperature, density and pressure of the air then existing, the defendants caused said airplane to be overloaded, and maneuvered the same in such manner as to cause said airplane to be flown into and against some high-power electric wires, or other obstructions, causing the same to crash into the ground, causing the demise of plaintiff's decedent.

VI.

That the defendants were careless, reckless and negligent in the operation of said aircraft in the following particulars, to-wit:

a. In attempting to take-off and fly said airplane when the same was over-loaded;

b. In failing to keep a proper, or any, lookout for obstructions in the path of the flight of said airplane, and to so maneuver said airplane as to avoid colliding with such obstructions;

c. In failing to keep said airplane under proper control;

d. By failing to cause said airplane to gain sufficient forward speed to permit the climbing of same;

e. By attempting to fly said airplane in a "nose high" attitude, and at a critical angle of attack, thereby causing the same to mush and become incapable of climbing above the objects on the terrain in the path of said flight;

f. By taking-off said airplane and attempting to fly same at or near the stalling speed;

g. That at all times and dates herein mentioned, there was in full force and effect, Civil Air Regulations of the Department of Commerce, Bureau of Aeronautics of the Government of the United States of America, inter alia, as follows, to-wit:

"§ 43.1010. Aircraft Operation Record. An aircraft for which an air worthiness certificate is currently in effect, shall not be operated unless there is attached to such [4] air worthiness certificate, an appropriate aircraft operation

record, prescribed and issued by the Administrator, nor shall such aircraft be operated other than in accordance with the limitations prescribed and set forth by the Administrator in such record. . . .”

That there was currently in effect for said Seabee aircraft, an air worthiness certificate and an aircraft operation record, prescribed and issued by the Administrator, which provided, inter alia, that said Seabee airplane was certificated under said Civil Air Regulations to be operated at a gross weight of not to exceed 3150 pounds. That at the time and place of said take-off and accident said aircraft was loaded and being operated by the defendants at a gross weight in excess of 3150 pounds, to-wit: more than 3489 pounds.

#### VII.

That the acts of carelessness, recklessness and negligence as hereinbefore alleged, and each thereof, were the proximate cause of the accident herein complained of; and of plaintiff's decedent's death.

#### VIII.

As a result of said accident, as aforesaid, the plaintiff's decedent, the said John B. Elie received injuries from which he died;

#### IX.

That at the time of his death, the said decedent left surviving him a widow, Matilda C. Elie, and a daughter, Jacqueline Elie; that the plaintiff in this action as executor and personal representative prosecutes this action for the benefit of said Matilda D. Elie, and Jacqueline Elie, as the surviving

widow and daughter, respectively, of decedent, by virtue of and pursuant to Section 8-903 Oregon Compiled Laws Annotated, as amended.

X.

That at the time of his death, the said John B. Elie [5] was 42 years of age, and an intelligent, industrious and dutiful husband and father, with a life expectancy of approximately 27.62 years.

XI.

That at the time of said accident, the decedent left surviving him his widow, Matilda C. Elie, of the age of 43 years, with a life expectancy of approximately 26.81 years, and his dependent daughter, Jacqueline Elie, of the age of 14 years, with a life expectancy of 51.89 years.

XII.

That prior to his death, the said John B. Elie was capable of earning, and, in fact, did have, an income of more than Five Hundred (\$500.00) Dollars per month out of which he supported his said widow and child.

XIII.

That by reason of the wrongful death of said John B. Elie, occasioned by the negligence of the defendants as aforesaid, the estate of said John B. Elie sustained a pecuniary loss and damage to its property, as hereinafter alleged, and the said Matilda C. Elie, his widow, and the said Jacqueline Elie, his dependent daughter, have been deprived of the care, aid and services of the said John B. Elie, all to their general damage in a sum greater than Ten Thousand (\$10,000.00) Dollars.



## XIV.

That by reason of said wrongful death, the plaintiff was obliged to incur and pay funeral and burial expenses for the decedent to its special damages in the sum of \$470.00.

Wherefore, plaintiff demands judgment against the defendants, and each of them, for the sum of Ten Thousand (\$10,000.00) Dollars general damages, and for the further sum of \$470.00 special damages, and for its costs and disbursements herein [6] incurred.

/s/ JOHN B. EBINGER,  
/s/ CHESTER E. McCARTY,  
Attorneys for Plaintiff.

State of Oregon,  
County of Klamath—ss.

I, Mary H. Crum, being first duly sworn depose and say that I am the Trust Officer of the The First National Bank of Portland, the plaintiff in the within entitled cause, and the foregoing complaint is true as I verily believe.

/s/ MARY H. CRUM.

Subscribed and sworn to before me this 16th day of February, 1948.

(Seal) /s/ BERYL TUCKER,  
Notary Public for Oregon.

My Commission expires Aug. 11, 1950.

[Endorsed]: Filed Feb. 18, 1948. [7]

[Title of District Court and Cause.]

NOTICE OF MOTION TO DISMISS  
COMPLAINT

To: Gerald Bridges, Esq., 216 West Sixth Street,  
Los Angeles, California; McCarty, Dickson &  
Swindells, 700 Yeon Building, Portland, Ore-  
gon; John B. Ebinger, U. S. National Bank  
Building, Klamath Falls, Oregon, Attorneys for  
the Plaintiff.

Please take notice that on Monday, the 5th day  
of April, 1948, at 10 a.m. of said day, or as soon  
thereafter as counsel can be heard, at the Court-  
room of the Honorable Peirson M. Hall, Judge of  
the above-entitled Court, in Courtroom No. 3, Fed-  
eral Building, City of Los Angeles, State of Cali-  
fornia, the above-named defendants and each [8]  
of them will move the Court as follows:

I.

To dismiss the complaint on the ground that the  
plaintiff has failed to state a claim against the  
defendants upon which relief may be granted.

II.

To dismiss the complaint on the ground that the  
plaintiff lacks capacity to sue.

III.

To dismiss the complaint on the ground that the

defendants and each of them lack capacity to be sued.

IV.

To dismiss the complaint on the ground of lack of jurisdiction over the subject matter.

This motion will be based upon this notice of motion, the complaint on file herein and the memorandum of points and authorities attached hereto.

Wherefore, the defendants and each of them pray that the complaint be hence dismissed.

Dated this 18th day of March, 1948.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR.

(Affidavit of service by mail attached.)

[Endorsed]: Filed March 22, 1948. [9]



In the District Court of the United States for the  
Southern District of California, Northern  
Division

No. 707-N.D.

THE FIRST NATIONAL BANK OF PORT-  
LAND as executor of the estate of JOHN B.  
ELIE, deceased, for and on behalf of the sur-  
viving widow, MATILDA C. ELIE, and the  
surviving daughter, JACQUELINE ELIE,  
Plaintiffs,

v.

JOHN GILBERT RANKIN and R. S. NOR-  
SWING, co-partners, doing business under the  
assumed name and style of RANKIN AERO-  
NAUTICAL ACADEMY, and JOHN GIL-  
BERT RANKIN and R. S. NORSWING, co-  
partners, doing business under the assumed  
name and style of RANKIN AVIATION IN-  
DUSTRY; SHIRLEY LORRAINE RANKIN  
as Executrix of the estate of JOHN GILBERT  
RANKIN, deceased,

Defendants.

### JUDGMENT

In this action the defendants, John Gilbert Ran-  
kin and R. S. Norswing, co-partners, doing business  
under the assumed name and style of Rankin Aero-  
nautical Academy, and John Gilbert Rankin and  
R. S. Norswing, co-partners, doing business under  
the assumed name and style of Rankin Aviation  
Industry; R. S. Norswing, individually, and Shir-  
ley Lorraine Rankin as executrix of the estate of  
John Gilbert Rankin, deceased, by their attorneys,

O'Connor & O'Connor, by William V. O'Connor, Esquire, 530 West Sixth Street, Los Angeles, California, having appeared and filed a motion to dismiss the plaintiffs' [11] amended complaint herein, and the issue of law thereto arising having been duly submitted to the Court by the defendants, and having come on to be heard before this Honorable Court, and the Court, being fully advised in the premises, good cause appearing therefor, did, heretofore, to-wit, on the 24th day of May, 1948, order that the said motion of the defendants to dismiss the said amended complaint in the above-entitled case be granted;

Now, therefore, it is ordered, adjudged and decreed that judgment be entered in favor of the defendants and each of them, and that the plaintiffs take nothing by this action, and that said defendants and each of them have and recover their costs herein.

Dated this 3rd day of June, 1948.

/s/ PEIRSON M. HALL,

United States District Judge.

Approved as to form, pursuant to Rule 7 of the Local Rules, So. Dist. of California, this 3rd day of June, 1948.

/s/ GERALD BRIDGES,

Attorney for Plaintiffs.

Judgment entered June 3, 1948. Docketed June 3, 1948. Book 4, Page 354. Edmund L. Smith, Clerk.

[Endorsed]: Filed June 3, 1948. [12]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT  
OF APPEALS UNDER RULE 73 (b)

Notice is hereby given that the above named plaintiff hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on June 3, 1948.

GERALD BRIDGES,  
Of Attorneys for Appellant.

[Endorsed]: Filed June 22, 1948. [13]

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[Title of District Court and Cause.]

STIPULATION DESIGNATING RECORD  
ON APPEAL

The above named parties, through their respective counsel, do hereby stipulate and designate for inclusion in the Record on Appeal the following:

I.

Complaint for Damages for Wrongful Death filed February 18, 1948, as amended by interlineation pursuant to Order of Court on May 3, 1948. [14]

II.

Notice of Motion to Dismiss Complaint filed March 22, 1948.

III.

Judgment filed June 3, 1948.

IV.

Notice of Appeal to Circuit Court of Appeals under Rule 73(b) filed June 22, 1948.

V.

This Stipulation designating contents of record on appeal.

Dated: July 21, 1948.

GERALD BRIDGES,  
CHESTER E. McCARTY,  
JOHN B. EBINGER,

By /s/ GERALD BRIDGES,  
Attorneys for Plaintiff and Appellant.

O'CONNOR & O'CONNOR,

By /s/ WILLIAM V. O'CONNOR,  
Attorneys for Defendants and Respondents.

[Endorsed]: Filed July 24, 1948. [15]

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In the District Court of the United States, Southern  
District of California, Northern Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 15, inclusive, contain full, true and correct copies of Complaint; Notice of Motion to Dismiss Complaint; Judgment; Notice of Appeal and Stipulation Designating Record on Appeal which constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing,

comparing, correcting and certifying the foregoing record amount to \$4.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 26th day of July, A.D. 1948.

(Seal) EDMUND L. SMITH,  
Clerk,

By /s/ THEODORE HOCKE,  
Chief Deputy.

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[Endorsed]: No. 11996. United States Circuit Court of Appeals for the Ninth Circuit. The First National Bank of Portland, as Executor of the Estate of John B. Elie, Deceased, for and on behalf of the surviving widow, Matilda C. Elie, and the surviving daughter, Jacqueline Elie, Appellant, vs. John Gilbert Rankin and R. S. Norswing, Co-partners, doing business under the assumed name and style of Rankin Aeronautical Academy John Gilbert Rankin and R. S. Norswing, Co-partners, d.b.a. Rankin Aviation Industry; R. S. Norswing, Individually, and Shirley Lorraine Rankin, as Executrix of the Estate of John Gilbert Rankin, Deceased, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Filed July 27, 1948.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



In the United States Circuit Court of Appeals for  
the Ninth Circuit

No. 11996

THE FIRST NATIONAL BANK OF PORT-  
LAND, as executor of the estate of JOHN G.  
ELIE, deceased, for and on behalf of the surviv-  
ing widow, MATILDA C. ELIE and the sur-  
viving daughter, JACQUELINE,

Plaintiff,

v.

JOHN GILBERT RANKIN and R. S. NOR-  
SWING, co-partners, doing business under the  
assumed name and style of RANKIN AERO-  
NAUTICAL ACADEMY, and JOHN GIL-  
BERT RANKIN and R. S. NORSWING, co-  
partners, doing business under the assumed  
name and style of RANKIN AVIATION IN-  
DUSTRY; R. S. NORSWING, individually,  
and SHIRLEY LORRAINE RANKIN, as ex-  
ecutrix of the estate of JOHN GILBERT  
RANKIN, deceased,

Defendants.

APPELLANT'S POINTS ON APPEAL AND  
DESIGNATION OF RECORD  
POINTS RELIED ON BY APPELLANT

I.

The law of the State of Oregon provides a sub-  
stantive right of action for damages resulting from  
wrongful death which survives the deceased and  
also survives the death of the wrongdoer and an

action for damages resulting from such wrongful death may be maintained by the personal representative of the deceased against the personal representative of the deceased wrongdoer.

II.

The law of the place of wrong governs rights of action arising from wrongful death.

III.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the deceased.

IV.

The law of the place of wrong determines whether an action for damages resulting from wrongful death survives the death of the wrongdoer.

V.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, if by the law of the State where the wrong took place such right exists.

VI.

An action for damages resulting from wrongful death may be maintained in the District Court, having jurisdiction, in any State, on a right of action arising in another State where the wrong took place, against the personal representative of the deceased wrongdoer in the State of the forum, if by the law of the State where the wrong took place such right exists against the personal representative of the deceased wrongdoer.

## VII.

The law of the State of Oregon provides that an action for damages resulting from wrongful death must be brought by the personal representative (executor or administrator) of the deceased for the benefit of the surviving spouse and dependents of the deceased.

## VIII.

If the law of the State where the wrongful death took place designates a particular representative to sue, such representative may bring such action in the District Court, having jurisdiction, in any State, as the owner of a claim in trust for certain distributees.

## IX.

The law of the State of Oregon provides that the measure of damages in an action resulting from the wrongful death of a person, is the pecuniary loss suffered by the estate of the deceased.

## X.

The law of the State of California provides that the personal representative of any person may maintain an action against the executor or administrator of a deceased wrongdoer who in his lifetime has wasted or destroyed the estate of such person by his wrongful death.

## XI.

The pecuniary loss suffered by the estate of a deceased by reason of the wrongful death of such deceased is a waste and destruction of the estate of such deceased by the wrongdoer within the pur-



view of Section 574 of the Probate Code of the State of California.

**XII.**

A cause of action based on tort is not such a claim under the law of the State of California as must be presented to and rejected by the executor or administrator of the deceased wrongdoer as a condition precedent to and filing of an action thereon.

**XIII.**

When a cause of action for tort exists against co-partners, the liability of the partners is joint and several and the death of the partner who committed the tortious act does not relieve the surviving partner of liability nor abate an action against him based thereon.

**DESIGNATION OF RECORD**

Appellant designates the entire record as certified to by the Clerk of the District Court.

**GERALD BRIDGES,  
McCARTY, DICKSON &  
SWINDELLS,  
JOHN B. EBINGER,**

By /s/ **JOHN B. EBINGER,**  
Attorneys for Appellant.

(Verified.)

[Endorsed]: Filed Aug. 3, 1948. Paul P. O'Brien,  
Clerk.

